

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JAMES C. ECKLES)	
Claimant)	
)	
VS.)	
)	
THOMAS BROTHERS CONSTRUCTION)	
Respondent)	Docket No. 267,171
)	
AND)	
)	
UNINSURED)	
Insurance Carrier)	
)	
AND/OR)	
)	
WORKERS' COMPENSATION FUND)	

ORDER

Respondent requests review of a preliminary Order entered by Administrative Law Judge Steven J. Howard on September 20, 2001.

ISSUES

The Administrative Law Judge's Order designated a treating physician and awarded temporary total disability compensation from January 15, 2001, through July 25, 2001. Court reporter fees were also assessed against respondent.

The respondent contends claimant was neither an employee nor a statutory employee pursuant to K.S.A. 44-503. In addition, respondent argues claimant's consumption of drugs contributed to his injury and disability. Accordingly, respondent contends it is not liable pursuant to K.S.A. 44-501(d)(2).

Conversely, claimant contends the Administrative Law Judge's Order should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein and the parties briefs, the Board makes the following findings of fact and conclusions of law:

The claimant was employed as a painter for Bill Fish Custom Painting Company. The claimant was working in a house being constructed by respondent, Thomas Brothers Construction.

On January 15, 2001, the claimant sustained a left ankle subtalar dislocation with complete talar neck fracture when he fell from a ladder. The injury was surgically repaired the same day.

The claimant testified the accident occurred when he was standing on the top rung of a 16-foot ladder with a spray gun in his right hand. Claimant was attempting to paint windows above and to his right. Claimant was holding on to the window pane with his left hand and when he let go with his left hand for a second, he fell.

The claimant denies he used drugs within 24 hours of the date of accident and denies he told anyone he had been using drugs. However, the report generated by the emergency medical personnel the date of the accident contains a notation that claimant stated he snorted methamphetamine between 7 and 8 the morning of the accident. The emergency physician record also contains a notation that claimant "used methamphetamines [*sic*] last night."

Mr. Bill Fish, the owner of Bill Fish Custom Painting, testified that after the accident he had gone to roll up the windows in claimant's truck and had discovered a white powder substance in the vehicle. When Mr. Fish visited claimant at the hospital he told claimant about the substance and claimant responded that it was methamphetamine. The claimant also told Mr. Fish he had taken some the morning of the accident. Mr. Fish testified claimant stated he was extremely high from the drugs, got carried away, overextended on the ladder and it kicked out from underneath him. Lastly, Mr. Fish testified the claimant further stated that the accident probably would not have happened if he was not on drugs.

When claimant arrived at work around 11 a.m., Mr. Fish told him what to do and at that time Mr. Fish had no reason to believe claimant was impaired. Mr. Fish agreed if he had noticed anything about claimant that concerned him, claimant would have been sent home.

Claimant agrees Mr. Fish visited him at the hospital but denies the conversation recounted by Mr. Fish occurred, denies he had drugs in his truck, denies he was on methamphetamine and denies making the statements attributed to him in the medical reports.

K.S.A. 44-501(d)(2) provides in pertinent part: "The employer shall not be liable under the workers compensation act where the injury, disability or death was contributed to by the employee's use or consumption of alcohol or any drugs, chemicals or any other compounds or substances,"

There is contradictory evidence regarding the dispositive issue whether claimant used drugs on the date of the accident and whether such usage contributed to his accident. Mr. Fish recounted his conversation with claimant during which claimant admitted using methamphetamine the day of the accident and that such usage contributed to his fall from the ladder. Conversely, although claimant admits he had a conversation with Mr. Fish, he denies making the statements or that he possessed or used drugs the day of the accident.

The contemporaneous medical reports corroborate Mr. Fish's version of events. The emergency medical personnel noted claimant admitted using methamphetamine the morning of the accident. The hospital records also mention methamphetamine usage. While it is possible a health care provider may on occasion fail to accurately record a history provided by the patient, it is not probable that two health care providers would each mistakenly record a history of drug usage. The medical reports place serious doubt on claimant's credibility when he denies making the statements. It is difficult to conclude the emergency personnel and hospital staff would fabricate such history from claimant.

In this instance, the contemporaneous medical records corroborate the testimony of Mr. Fish and undermine the credibility of claimant's denials. Accordingly, the Board finds the testimony of Mr. Fish more persuasive regarding claimant's admissions of drug usage and its contribution to the accident. The Board reverses the decision of the Administrative Law Judge and finds respondent is not liable pursuant to K.S.A. 44-501(d)(2).

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Steven J. Howard dated September 20, 2001, is reversed in accordance with the foregoing determination that the accident was contributed to by claimant's usage of drugs.

IT IS SO ORDERED.

Dated this _____ day of March 2002.

BOARD MEMBER

c: Dennis L. Horner, Attorney for Claimant
Kevin J. Kruse, Attorney for Respondent
J. Paul Maurin III, Attorney for Workers' Compensation Fund
Steven J. Howard, Administrative Law Judge
Philip S. Harness, Workers Compensation Director